

IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1897.

THE NORTHWESTERN NA-
TIONAL BANK, THE RIOR-
DAN MERCANTILE COM-
PANY, AND THE ARIZONA
LUMBER AND TIMBER COM-
PANY,

Appellants,

vs.

B. N. FREEMAN, F. L. KIMBALL,
AND J. H. HOSKINS, CO-PART-
NERS AS THE ARIZONA CEN-
TRAL BANK, AND JOHN VOR-
IES,

Appellees.

No. 209.

*Appeal from the
Supreme Court
of the Territory
of Arizona.*

BRIEF FOR B. N. FREEMAN ET AL., CO-PARTNERS
AS THE ARIZONA CENTRAL BANK.

Preliminary to the discussion of the alleged errors assigned by appellants, we contend that as this case now stands, no error specified by these appellants should

be considered by this court which does not affect the rights of all of them.

The rule adopted by the state courts may be stated as follows: "Where several parties unite in one assignment of errors, they will encounter defeat unless the assignment is good as to all. If the errors affect the parties severally and not jointly, the proper practice is for each party to assign errors, for the rule is well settled that a joint assignment will not permit one of several parties to avail himself of errors upon rulings which affect him alone, and not those with whom he should unite in the assignment." (Elliott's App. Prac., section 318.) Appellants have joined in one assignment of errors.

"Come the said appellants in the above entitled cause, and say that there is manifest error in the record and proceedings in said cause, and do hereby note, specify and assign the same as follows:" (Tp., page 107.)

The record also discloses that the defendant, Fulton, appeared by his attorney, E. E. Ellinwood, and filed his separate answer. (Tp., page 18.)

The defendant, J. J. Donahue, appeared by his attorney, E. E. Ellinwood, and filed his separate answer. (Tp., page 19.)

The appellant, The Riordan Mercantile Company, appeared separately, by its attorney, E. E. Ellinwood, and filed its answer. (Tp., page 26.)

The appellant, The Arizona Lumber and Timber Company, appeared by the same attorney, and filed its answer. (Tp., page 30.)

The appellant, The Northwestern National Bank, appeared by its attorneys, Herndon & Morris, and filed its separate answer. (Tp., page 35.)

Decree was rendered, and all the above named appellants joined in motion for new trial, alleging as grounds therefor, errors in the decree and rulings of the court, made during the trial. (Tp., page 81.)

In appeal from the District Court of the territory to the Supreme Court of the territory, the appellants, The Arizona Lumber and Timber Company and The

Riordan Mercantile Company, joined in assigning error (Tp., page 83); and the appellant, The Northwestern National Bank, assigned separate error. (Tp., page 88.)

Upon the affirmance of the case, all the above named appellants joined in a motion for rehearing. (Tp., page 99.)

Thereafter all these appellants joined in application for an appeal to this court. (Tp., page 102.)

Although the appellant, The Northwestern National Bank, assigned error separately from the other appellants in the appeal from the District Court to the Supreme Court of the territory, yet this court has held that "the assignment of errors on the appeal from the District Court to the Supreme Court of the territory cannot be accepted in this court as the equivalent of the assignment required by the statute." (*Benites vs. Hampton*, 123 U. S., 519.)

While that case was brought to this court upon writ of error," and this case is brought upon appeal, yet this court has decided that "the rules, regulations and restrictions are the same as to appeals as in cases of writs of error." (*Farrar vs. Churchill*, 135 U. S., 609.) "And appeals are subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases or writs of error." (Rev. Stat., section 1012.)

We therefore urge, upon the authority of the last two cases, that appellants are confined to the errors alleged upon the appeal from the Supreme Court of the territory to this court, and if the rule above contended for is adopted by this court, the rights of the appellants stand upon the same footing.

This court has said, in *Phillips, etc. Construction Co. vs. Seymour*, 91 U. S., page 646: "The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the appellant's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points."

This practically states the purpose of any and all pleadings, and the above statement in fact defines the

assignment of errors required by the rule, and the statute, as a pleading.

"It is a rule of practice essential to the orderly administration of the law that all who join in a motion or pleading must show a right to the relief demanded. The rule applies to complaints, answers, demurrers, motions for new trials, and other matters of procedure. Again and again has it been applied to assignments of error."

Wall et al. vs. Bagby, 126 Ind., 372, citing numerous cases.

"In this court the assignment of errors constitutes the complaint of the appellants, and, like a complaint in a trial court, it must be good as to all who join therein, or it will not be good as to any of them. Where two or more appellants join in one assignment of errors, if they jointly complain, in any specification or paragraph of such assignment, of a ruling against one of them only as error, such specification or paragraph of error cannot be sustained as to any one, because it is not well assigned by all who have joined in such assignment."

Walker et al. vs. Hill, 111 Ind., 223.

To the same effect:

Hinkle vs. Shelley, 110 Ind., 88.

Kimbrel vs. Rogers, 90 Ala., 339.

Rudolph vs. Brewer, 96 Ala., 189.

Gordon et al. vs. Little, 41 Neb., 215.

Small et al. vs. Sandell, 45 Neb., 306.

Harold vs. Moline Milburn Co. (Neb.), 63 N. W. R., 939.

Hillens et al. vs. Brinsfield (Ala.), 21 So. R., 208.

This rule is in harmony with the general principle of pleadings. "An assignment of errors is in the nature of a declaration."

2 Tidd's Practice, 1168.

3 Bacon's Abr., 368.

"A plea which is bad in *part* is bad *in toto*, if therefore two defendants join in a plea which is sufficient for one but not for the other, the plea is bad as to both, for the court cannot sever it and say the one is guilty and that the other is not, where they all put themselves upon the same terms."

Chitty Pleadings, * page 594.

This rule is so universally adopted as to pleadings that the citation of authorities seems unnecessary, and the only question is whether this court will adopt the rule that the assignment of errors is in the nature of a pleading.

Neither are we limited to authorities from the state courts, applying the general rule of pleading to assignment of errors. "In respect to the after-acquired property, it is not claimed that the mortgage was invalid or ineffective as between the parties to the instrument. If, therefore, the court erred in extending the lien of the mortgage over property of that kind, the judgment creditors alone were harmed by the ruling, and the error should have been assigned by them, or in their behalf, only."

Grape Creek Coal Co., et al. vs. Farmers' Loan and Trust Co., 12 C. C. A., 350; 24 U. S. App., 38; 63 Fed., 891.

McDonald vs. U. S., 12 C. C. A., 339; 24 U. S. App., 25; 63 Fed., 426.

It will be observed that the question in the above case, from which we quote, was the same question which is the principal matter of contention in this case, viz., as to whether the mortgage shall extend in that case to the after-acquired property, and in this case to the increase; and we apprehend there can be no doubt as between the appellee bank and The Arizona Lumber and Timber Company, which took its mortgage in terms sub-

ject to the rights of appellee bank, that the judgment in this case, extending the mortgage to the increase, is correct, and if The Northwestern National Bank claims rights not common to the other appellants, error should have been assigned by it only.

If this court adopts the view that by reason of The Northwestern National Bank having joined in assigning error with the other appellants, and by reason of its other acts of joinder with them, it has placed itself upon the same terms with the other appellants, there are practically only two questions presented by appellants' assignment of errors.

First—Was the appellee bank's mortgage void for uncertainty of description?

Second—Did its mortgage extend to the increase, the mortgage in terms being silent as to increase?

The first question is raised by assignment of errors, as to the introduction of the mortgage in evidence, and on motion to strike at the close of the case.

Assignments II. and V., Tp., pages 108 and 109.

Whether or not this was error, depends upon the facts appearing in the case.

We contend that the description, so far as appellee bank's mortgage is concerned, was made definite and certain by subsequent events.

The only testimony as to the number and character of this band of sheep at different times, from the date of appellee bank's mortgage, July 10, 1890, to the date of the decree, was given by defendant, Fulton.

We quote the entire testimony on this subject, as to the character and numbers of the sheep from July 10, 1890, to December 18, 1893.

Fulton testified, on direct examination, on behalf of plaintiffs: "I took the inventory at the time of the attachment, on the 18th of December, '93. I counted the sheep in connection with the sheriff. The sheep are between thirty and forty miles south of here, in Coconino county. The record shows the number of sheep on that

date. I can not tell separate and apart from the records. I made the proper inventory, which was delivered to the sheriff. There is no change in the sheep from January 3rd, 1893, to December 18th, '93, except from the natural loss on the range. May and (Tp., page 58) June is the lambing season. The lambs specified in the inventory mean the lambs of '93; the May and June lambs. At the time of the giving of the mortgage in 1893 the sheep were estimated.

"Q. If there were 2,926 ewe sheep on the 18th of December, how many would there be on January 3rd, '93? And state how you would estimate it.

"Objected to as incompetent and immaterial. Objection overruled; to which ruling of the court said defendant excepted.

"A. It is difficult to arrive at any such number. If among ewes, the loss is comparatively light for that particular season. I presume one hundred head would be the conservative number to estimate.

"Q. How about the wethers? A. There is a loss comparatively slight of them.

"Q. If there were nine hundred on the 18th of December, how many would there have been on January 3rd? A. Of course there is butchering along from time to time for commercial use, and that would be for eleven months, possibly say 88 or 90 head up to that date, in round numbers.

"Q. And the lambs, 1,287. Were the lambs of the increase occurring in May and June? A. In May and June.

"Q. There were none sold from January 3rd, 1893? A. No." (Tp., page 59.)

On cross examination he testified:

"At the time the attachment was levied by the sheriff, December 18th, 1893, I had none of the male sheep that were included in the Hoskins and Vories mortgages, and the lambs described by the sheriff are the lambs of the year 1893. In the season of 1891 there was an unusually heavy loss among ewes. I have to approximate how many there were. I presume a thousand head would

be in existence on December 18th, '93—I mean a thousand head of those ewes I mortgaged in July, 1890. These were not included in the increase, and there were no male sheep. I can't say about the dry ewes. There might be some in the band in '90 that would not be there afterwards." (Tp., page 66.)

Inventory showed ewes.....	2,926
Add for natural loss from January 3 to December 18.....	100
Inventory showed wethers.....	900
Add for loss, butchering, etc.....	90
Total, January 3, 1893.....	4,016

None were sold during the interval elapsing between January 3 and December 18, 1893. The lambs mentioned in the inventory were of May and June of that year.

The male sheep of July 10, 1890, had all been sold, butchered or had died, but none were sold during that interval, and only eighty-eight or ninety butchered.

It will be observed that appellee bank's mortgage covered the lambs in existence on July 10, 1890, and the bearing ewes in existence on July 10, 1890, the non-bearing ewes being included in the Vories mortgage, and designated as "dry" ewes, to distinguish them from the bearing ewes.

It follows that the sheep in existence on January 3, 1893, were one thousand of the bearing ewes of July 10, 1890, to which must be added the one hundred dying from natural causes between January 3, 1893, and December 18 of that year, with their natural increase, and the increase of such of the six hundred bearing ewes that bore lambs before their death during the interval elapsing between July 10, 1890, and January 3, 1893, together with such of the lambs as remained of July 10, 1890.

There can be no other conclusion from this testimony than that the sheep in existence belonging to Fulton on the 3d day of January, 1893, and covered by a second mortgage to appellant, The Arizona Lumber and Timber Company, were either those bearing ewes and

lambs covered by the appellee bank's mortgage, or their natural increase, and the entire number at that date did not exceed 4,016 sheep, while all of the male sheep covered by both appellees' mortgages had died, or been sold or butchered.

The mortgage of January 4 was recorded on January 5, and continued of record, unsatisfied, to the date of the decree, and the appellant, The Arizona Lumber and Timber Company, have a decree for the amount unsatisfied, amounting to the sum of \$418. Although the appellee bank did not go to the range where the sheep were ranging, and with the defendant, Fulton, go through the ceremony of saying these are the increase which are the increase of the original bearing ewes, and therefore are subject to your mortgage, according to our agreement, yet he did, in the most solemn way, by his recital in the mortgage of January 4, 1893, designate, identify and point out that his entire band was subject to the mortgage of appellee bank.

A mortgage of a certain number out of a larger number is not *void*, but is valid between the parties and gives grantee right of selection on the ground that the instrument is construed most strongly against the grantor, and some intention must be given the instrument.

"A mortgage conveying 50 mares, branded F2, where the mortgagor owns 300 such mares, and there is no means of determining which ones of the 300 were intended to be mortgaged, is not void for uncertainty, and the mortgagee has the implied power to elect, as to which ones shall be deemed included in the mortgage."

Oxsheer et al. vs. Watt, 41 S. W. R. (Tex.),
46.

This case we commend both upon principle and authority.

"In Call vs. Gray, 37 N. H., 428, it was contended that a mortgage of a certain number of beds, chairs, etc., without any further designation, in a house containing many other articles of the same kind, was void, because

the instrument contained no description by which the property intended to be mortgaged could be designated; but the court held it valid, saying: 'The doctrine is same as that which prevails in conveyance of real estate,—that the grant shall be taken most strongly against the grantor. * * * The mortgagor had nothing further to do to make the mortgage perfect, and the plaintiff had the right to make a selection of the articles. The mortgage then, so far as the instrument itself went, was legal between the parties.'"

Oxsheer et al. vs. Watt, *supra*.

In support of this proposition are cited:

Elliott vs. Long, 77 Tex., 467; 14 S. W., 145.

Leighton vs. Stuart, 19 Neb., 546; 26 N. W., 198.

Frost vs. Bank, 68 Wis., 234; 32 N. W., 110.

We further cite in support of this proposition:

Jones (last paragraph), section 56.

Cobbey, section 183.

Herman, section 74.

Gurly vs. Davis, 39 Ark., 394.

Such mortgage is good as to parties having notice.

Cobbey, section 186.

Clapp vs. Trobridge, 74 Iowa, 550.

Oxsheer vs. Watt, *supra*.

Before any of the parties appellant had acquired any rights, there were only 4,016 sheep in the Fulton band, and it is immaterial if grantee had previously allowed grantors to make selection, and of this fact appellants can not complain.

The rights of appellants are to be determined by the circumstances existing at the time their rights were acquired.

Cobbey, section 186; Jones, 56*a*.

Leighton vs. Stewart, 19 Neb., 546.

Cole vs. Green, 77 Iowa, 307.

Clapp vs. Trobridge, 74 Iowa, 550.

Interstate Galloway Cattle Co. vs. McClain,
42 Kan., 680.

Elliott vs. Long, 77 Tex., Supreme C.

The property covered by appellee bank's mortgage was rendered definite and certain between the bank, Fulton, and Sisson, who was treasurer of both appellant companies, and there can be no doubt upon this proposition, if we resort to the testimony of the witnesses upon this subject, but we need go no further than to what the mortgage of January 4 itself discloses, to substantiate this proposition, taken in connection with the fact that there were only 4,016 sheep in the band on that day.

There is no controversy as to the proper description of the sheep in that mortgage, and can there be any doubt as to what property was meant by the term *above sheep* when taken in connection with the remainder of the mortgage?

It appears to us that the property was particularly separated, distinguished and identified by this transaction of January 4, 1893.

APPELLEE BANK'S MORTGAGE COVERED THE INCREASE.

The second proposition, as to whether or not the mortgage of the appellee bank shall extend to the increase, it in terms being silent as to increase, is raised by various assignments of error as to the admission of evidence, and the court's decree extending the same to the increase.

In so far as the mortgage of the appellee bank is concerned, we shall contend, as a matter of law, that independent of any contract of substitution, and by reason of their mortgage covering the bearing ewes, it likewise

covered the increase, as between Fulton and the bank and all parties having notice.

Between the parties to a mortgage, if the dam be under mortgage at the time of parturition, the mortgage extends to and covers the increase until the mortgage indebtedness is paid, and this is true although the mortgage is silent as to increase.

Jones on Chattel Mortgages, section 149.

Cobbey, section 366.

The brood of all tame or domestic animals belongs to the owner of the dam, or mother, and at common law, the increase or young of mortgaged animals belongs to the mortgagee.

Jones, C. M., section 149, and cases cited.

Cobbey, sections 365 to 368 and cases cited.

Pyeatt vs. Powell, 51 Fed., 551.

Arkansas Val. L. and C. Co. vs. Mann, 130 U. S., 78.

Fowler vs. Merrill, 11 How., 375.

The civil law has been adopted by most of the state courts, and is stated as follows:

"Although the mortgage be restricted to certain things, yet it will nevertheless extend to all that shall arise or proceed from that thing which is mortgaged, or that shall augment it, or make part of it. Thus, when a stud of horses, a herd of cattle, or a flock of sheep is put in pawn, into the creditor's hands, the foals, the lambs, and other beasts which they bring forth, and which augment their number, are likewise engaged for the creditor's security, and if the herd or flock be entirely changed, the heads which have renewed it are engaged in the same manner as the old stock." Domat, Civil Law (by Strahan), section 1663.

Cahoon vs. Miers, 67 Md., 573.

Moreover, the lien continues until the debt is paid, as between the parties, and to all parties having notice.

"The attempt has been made to draw a distinction when, during the time the property remained with the mortgagor, the offspring so increased in strength and maturity as to cease to follow the dam.

In such case it has been contended that the mortgage ceases to bind the offspring. We are at a loss to conjecture upon what principle such a distinction can be maintained. We apprehend, however, that all such seeming rulings rest upon an entirely different principle. The exception has been allowed only in favor of *bona fide* purchasers, who, finding such offspring in the possession of the mortgagor, arbiter of its own movements and not following its dam, purchased and paid for the same *without* notice of the mortgage lien."

Meyer et al. vs. Cook, 85 Ala., 417.

"There would seem to be no valid reason for terminating the lien, as against the mortgagor, merely because the period of 'suitable nurture' has passed. Such nurture did not give the lien, and its termination could not take it away as against the mortgagor. As to such mortgagor the question of notice or insufficiency of description is not involved, for he had actual notice that such increase was, in fact, covered by the mortgage."

Funk vs. Paul, 64 Wis., 35.

But it is contended by the appellants that it was incumbent upon appellee bank to show that there were increases from specific animals mortgaged.

We contend that it sufficiently appears from the "findings" that the sheep in existence on the day of the decree were either what remained of the original bearing ewes and their lambs of July 10, 1890, or their increase.

No other conclusion can be reached, if, for the sake of clearness, we place in juxtaposition those portions of the findings which refer to the number and character of the sheep at different times from July 10, 1890, to the day of the decree, and take such findings in connection with the fact that the entire record is absolutely silent

as to any purchase of sheep by Fulton, or of his acquiring any sheep by any other means.

"That on said day (July 10, 1890) Fulton owned and "possessed 6,200 sheep that were herded, and run together, "and those were all he owned, marked in the Fulton "mark, ———." "That said Fulton continued in the "ownership and possession of all of said sheep, save only "such as died, were sold by him, consumed or lost, until "the 18 December, 1893. At no time did appellees or "either of them ever take or ever have possession of said "sheep or of any of them or of the *increase thereof*, nor "were any of said sheep or the *increase thereof* ever by any "one identified, designated, or in any way segregated, ap- "portioned or substituted to the or on account of the said "pretended mortgages or either thereof." "That on De- "cember 18, 1893, The Riordan Mercantile Company at- "tached sheep mentioned in inventory, same being all "the sheep then owned by said Fulton." "That on the "31st day of March, 1894, the sheriff *sold said property*, "and delivered the same to the appellant, Riordan Mer- "cantile Company, who then entered into the possession "thereof, was still in the possession thereof when this "cause was tried in the lower court, and are still in the "possession thereof." (Transcript, folios 216 to 221.)

So far as appellees are concerned, they never made any claim to any sheep that were not the original mort- gaged sheep or their increase, and this was one of the principal contentions in the case as to whether or not the appellee bank's mortgage should extend to and cover the increase. The first suggestion made in the entire record, that there was any possibility of any other sheep than those of the original sheep and the increase thereof, was made in appellants' brief filed in this court, while in the sixteenth assignment of error, one of the grounds therein mentioned is "that no possession was taken of "said increased number or of the number of the increase "that *it is adjudged* was agreed should be added to said "mortgage."

EFFECT OF RECITAL AS NOTICE TO THE NORTH- WESTERN NATIONAL BANK.

In the event that this court should not sustain us in the position we have taken, that The Northwestern National Bank has placed itself upon the same terms with the other appellants, we still maintain that it had notice of the appellee bank's rights in and to the property in controversy, by reason of the recital in the mortgage of January 4, 1893, or at least had sufficient notice to put in upon inquiry, which, if pursued, and inquiry made at the proper source of information, would have disclosed the true state of the facts.

As before shown, the sheep in existence on the 4th day of January, 1893, numbered 4,016, and they were either the bearing ewes and lambs covered by appellee bank's mortgage of July 10, 1890, or their increase.

The situation of the recital, appearing as it does immediately following the descriptive clause of the mortgage, makes it certain at least that the entire band was bound for the payment of appellee's mortgage. After describing real estate, "also about three thousand ewes, one thousand wethers and two thousand lambs; same being all the sheep now owned by mortgagor and including all the wool and increase which may be produced by said sheep; all running on their accustomed range in Coconino county, marked, ewes, split in right ear, hole in left; wethers, reverse. (This being subject to a mortgage on five thousand of above sheep to Arizona Central Bank and on one thousand head and the residence property of Jno. Vories. Said number as described in mtgs. to be kept good out of increase)." (Tp., page 14.)

There can be no question about the correctness of the above description, for it says "being all the sheep now owned by the mortgagor," and all the authorities agree that the fact that there are less than what the mortgage calls for does not render the description uncertain. While the above recital does not, in terms, state that a large portion of the "above sheep" are increase, and thereby recite the true state of the facts, yet it does dis-

close that there is a mortgage on the entire flock, and points to the source of inquiry, namely, to The Arizona Central Bank. The mortgage of July 10 covered 1,600 ewes, and there were, on January 4, 1893, nearly twice as many ewes, but it will be observed that the term "above sheep" includes both sexes, and clearly shows the intent of the parties that the mortgage of July 10, 1890, should extend to and cover the increase. The mortgage of August 30, under which The Northwestern National Bank claims, in terms covers only 4,500 matured sheep, which is 500 less than the number which the recital described as being subject to a mortgage to the appellee bank, the lambs being the lambs of May and June of that year. (Tp., page 16.) The term *above sheep* can have no other signification than the above described sheep, which terms apply particularly to the mortgage of the appellee bank.

The legal question presented in this connection is, how far a mortgagee (or assignee) is bound by the recitals in other mortgages of record at the time his rights were acquired, executed by the person from whom he claims, if the recital purports to affect the same property.

a. Was it incumbent upon the appellant bank to examine the record?

b. Would an examination of the record identify or point out the property covered by the mortgage, or point to the source of information?

"There is no difference in principle between the effect of recitals in papers by which the title to real and personal property is transmitted, when the latter is conveyed or affected by written instruments. This is generally either where the title is acquired under a will, or a *chattel mortgage* or trust deed."

Wade on Notice, section 332.

The expression "had he examined the records," found in many authorities in speaking of third persons dealing with mortgaged property, would indicate that it is incumbent upon such persons to examine the records, and the fact that the note was negotiated in the distant

city of Chicago can not relieve the assignee of the ordinary precautions that a person would be required to take living in the vicinity at which the mortgage was given and the property situated.

"If the defendant had examined the records of Lincoln county, *as it was his duty to do*, he would have found the two mortgages dated November 9, 1885, in which the cattle were described by their ages and the marks and brands which they bore; and wherein it is stated that they are the cattle purchased by the plaintiff." "If he had examined the records of Jewell county, where the cattle were held at the time the mortgage to him was executed, and where King, who claimed to be the owner, resided, he would have learned the history of the transactions between the cattle company and Martin; but, instead of examining the records of either Lincoln or Jewell counties, *as ordinary prudence*, even, would dictate, he claims to have invested \$10,000 in a roving herd of cattle that he had never seen, the owner of which he does not know, and without examining the records, to ascertain whether this stranger had a title to the cattle, or whether there were any existing liens upon them."

Interstate Galloway Cattle Co. vs. McLain, 42
Kan., 680.

In Kneller vs. Kneller, 86 Iowa, 417, the controversy was between mortgagee and attaching creditor without actual notice.

The recital in that case is nearly identical in terms with the case at bar, and is exactly to the same effect, and in both cases the recital refers to the *above* property.

"No useful purpose would be served by a review of the numerous cases in Iowa wherein the question of the sufficiency of the description of the property in a chattel mortgage has been discussed. We have carefully considered them. This case is unlike any of them in the fact that there is a recital in plaintiff's mortgage which, in effect, at least so far as *notice* is concerned, incorporates the prior mortgage into plaintiff's mortgage.

"It seems to me that the recital in plaintiff's mortgage of the prior mortgage, coupled with the description given of the property in both mortgages, is sufficient to put the defendants upon inquiry; and it is admitted that such inquiry would have led to the identification of the property."

The question asked by the Supreme Court in that case, and answered in the above language, makes it incumbent upon the purchaser to look to the records and follow up any inquiry suggested thereby.

"Now, does this raise an inquiry that would of itself lead a reasonably prudent man to follow up the identity of the property?"

Where two mortgages are of record, one of which correctly describes the property and refers to the other as being upon the same property, the description of such other mortgage is rendered definite, and the record is sufficient to impart notice to the world.

"The description in plaintiff's mortgage without reference to that contained in the mortgage to Hay, was insufficient, but it was competent for the parties to refer to the description used in the Hay mortgage, and when both were filed for record, as the evidence shows they were in this case, were sufficient to impart notice to the world."

Thompson vs. Anderson, 94 Iowa, 554; citing
Newman vs. Tymeson, 13 Wis., 172;
Kneller vs. Kneller, *supra*.

This recital had this additional effect as to The Northwestern National Bank, in that its assignor, The Arizona Lumber and Timber Company had acknowledged by taking its mortgage in terms subject to that of the appellee bank, that all the sheep that Fulton owned in his mark and brand, were covered by a prior chattel mortgage to appellees.

To avoid the effect of the record of the recital, the appellants in their brief (page 25) are attempting to "let go" for The Arizona Lumber and Timber Company, and now claim that the mortgage of January 4, 1893, "was not satisfied on the record, however, because it covered

other property, and the debt was not fully paid. But when The Arizona Lumber and Timber Company declared to Northwestern National Bank that the mortgage of August 30 was a first lien on all the sheep, The Arizona Lumber and Timber Company relinquished its right to all the sheep under the mortgage of January 4, and now makes no claim to any of the said sheep under said mortgage. That mortgage was then dead, so far as The Northwestern National Bank was concerned."

It comes too late to now, for the first time, ask this court to "kill" the mortgage of January 4. Throughout this case these appellants have urged the rights of The Arizona Lumber and Timber Company, and it will appear from the record that this is the first time that they have made a concession that their mortgage was not prior to that of the appellees. The fact that Sisson, the treasurer of The Arizona Lumber and Timber Company, stated (Transcript, folio 161) to The Northwestern National Bank that the note was secured by a first mortgage on 6,000 sheep, when as a matter of fact the mortgage of January 4 was a prior mortgage and covered all the sheep, with the increase, might postpone the rights of The Arizona Lumber and Timber Company to the rights of The Northwestern National Bank, but it did not "kill the mortgage."

In this, the court very properly in its decree postponed the rights of The Arizona Lumber and Timber Company to those of The Northwestern National Bank, on account of the misrepresentations of Sisson.

Section 2369, Revised Statutes of Arizona, requires the mortgagee to discharge the mortgage of record when the same has been satisfied. "When the debt secured by any such instrument shall have been paid or satisfied, it shall be the duty of the mortgagee to enter or cause to be entered satisfaction thereof." There is no statute requiring a renewal to be filed in this territory, and a mortgage properly filed continues to be notice of everything it contains, until discharged of record, the same as a mortgage upon real property.

"Whenever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would

have discovered had he performed the duty. Means of knowledge with the duty of using them, are, in equity, equivalent to knowledge itself."

Cordova vs. Hood, 17 Wallace, 1.

It was *idle ceremony* for The Northwestern National Bank to rest its inquiry with Sisson, and the inquiry should have been made of the parties who would have been bound by their statements.

Cordova vs. Hood, *supra*.

The Northwestern National Bank took its mortgage with the constructive notice that its assignor had acknowledged the existence of a prior mortgage on all the sheep owned by Fulton.

The holder of a mortgage "in terms" made subject to another mortgage can not defeat it upon technical grounds, and his only defense to the same is that it has been paid.

Jones on Chattel Mortgages, 494.

Cobbey on Chattel Mortgages, 1038-1039, and cases there cited.

Eaton vs. Tuson, 145 Mass., 218.

Flory vs. Comstock, 61 Mich., 522.

Gammon vs. Buell, 86 Iowa, 954.

Cassidy et al. vs. Harrelson, 1 Colo. App., 458.

Clapp vs. Halliday, 48 Ark., 258.

Hoagland vs. Shampanor, 37 N. J. Eq., 588.

The rule in such case is that the second mortgage takes only the rights of the mortgagor, viz., to redeem from the first mortgage.

Cases cited last above.

If appellant bank had gone no farther than to what the record disclosed, it would have discovered not only that its assignor had taken a mortgage subject to appellees' mortgages upon the same property, but that its assignor had agreed with Fulton to keep said mortgages good in the future out of the increase.

Whether or not the fact of Sisson's signing the affidavit to the mortgage is equivalent to signing the contract is immaterial, it was the contract of said bank's assignor, nevertheless.

"A written agreement, although not signed by the parties, will, if orally assented to by them, constitute the agreement between them."

Dutch vs. Mead, 36 N. Y. Superior, 427.

Farmer vs. Gregory, 78 Ky., 475.

Bacon vs. Daniels, 37 Ohio St., 279.

Bishop on Contracts, section 342.

The acceptance of a conveyance containing a positive agreement to be performed by the grantee, binds the grantee with like effect as if he had signed the conveyance, and binds him although the agreement be made for the benefit of third parties.

Jones on Mortgages, section 752, and cases cited.

The mortgage shows that it was "filed at the request of F. Sisson." (Transcript, page 16.)

A party is presumed to have actual notice and to have consented to all that appears in his own conveyance.

Finlay vs. Simpson, 53 Am. Dec., 252.

The appellant bank can not escape the effect of notice by recital.

The recital appears in the mortgage taken by its own assignor from Fulton, from whom the said appellant bank now claims. The sheep in all the mortgages were designated by the Fulton brand and no other, which, by the statute of the territory is made *prima facie* evidence of ownership.

Section 2785, Revised Statutes of Arizona: "Every person being the owner of horses, mules, cattle, sheep, goats or hogs, shall have and keep a mark, brand and counter-brand different from the marks, brands and counter-brands of his neighbors."

Sec. 2786. "Every such owner shall record with the county recorder of his county, his mark," etc.

Sec. 2788. "On the trial of any action to recover the possession of any animal which is marked or branded as provided in this act, the brand shall be deemed *prima facie* evidence that the animal belongs to the owner of the mark and brand."

The brands made the description good, except as to the sexes, and as before observed, *above sheep* applies to all sexes, and does not limit it to the sexes described in the mortgage of July 10, 1890.

The simple fact that The Northwestern National Bank was taking a note secured by mortgage would in and of itself dictate to an ordinarily prudent man the necessity of examining the record of chattel mortgages, and if it was incumbent upon the said bank to make such examination, then it can not escape the notice conveyed by the recital.

It is no longer the rule that the description must be such that unaided by other evidence the property might be identified.

"A chattel mortgage duly acknowledged and recorded, after describing certain other chattels as then upon the farm of the mortgagor, contained this description, to-wit: 'Twenty two-year-old steers on same farm.' It was objected that this description was insufficient to identify the property as to others dealing with the mortgagor: Held that the record of the mortgage was sufficient notice to subsequent purchasers that the mortgagee had some claim of right to cattle upon the farm, and that parol evidence was necessary and admissible to identify the particular cattle."

Bell vs. Prewitt, 62 Ill., 361.

THE RIORDAN MERCANTILE COMPANY.

Its appeal must be dismissed for want of jurisdiction. According to its own contention "that the *attachment lien* of The Riordan Mercantile Company and the

mortgage owned by The Northwestern National Bank are prior and subsisting liens to the alleged mortgages of appellees" (appellant's brief, page 30), then its appeal must be dismissed if its demand be a lien, and its claims nothing by reason of the foreclosure of the same; for the amount of the claim is only \$810.91. (Record, page 105.)

But in any event its appeal must be dismissed. The affidavit filed for the purpose of establishing the jurisdiction of this court states "that the value of said property exceeds the sum of \$5000.00." (Record, page 103.) How much in excess of \$5,000 the value of the property is, there is nothing in the record to show. There has been no contention, nor can there be any, but what the right of The Riordan Mercantile Company to participate in the fund arising from the foreclosure sale shall be postponed to that of The Northwestern National Bank, whose claim was adjudged at \$5,875. (Record, page 44.) Whether The Northwestern National Bank's mortgage be adjudged first or second in priority, in order that the amount in dispute between The Riordan Mercantile Company and appellees, or either of them, should equal the jurisdiction of this court, the value of the property should exceed \$5,000 over and above the claim of The Northwestern National Bank, as to which fact the record is silent.

The demands of appellants are separate and distinct, and as to each appellant, the matter in dispute, between it asserting on the one side, and the appellees denying on the other, must exceed \$5,000, or the appeal must be dismissed as to it for want of jurisdiction.

Gibson vs. Shufeldt, 122 U. S., 27.

Smith Middlings Purifier Co. vs. M'Groaty, 136 U. S., 237.

Stewart vs. Dunham, 115 U. S., 61.

Ogden City vs. Armstrong et al., No. 127, Oct. Term, 1897; decided Nov. 29, 1897.

Its position, however, is no better than that of The Arizona Lumber and Timber Company, which took its

mortgage in terms subject to appellee bank's mortgage.

The findings of fact state that during all the transactions among the parties to this action, Sisson was treasurer of both appellant companies (record, page 106), and by reference to the testimony Sisson conducted all the transactions for both appellant companies. (Record, page 55.)

The finding of the District Court was that Sisson's agreement was on behalf of both appellant companies. (Record, pages 42 and 43.)

But as we understand the contention of this appellant, it claims that it was not represented at the transaction of January 3, 1893.

The indebtedness of Fulton to appellant companies was at that time evidenced by a note and chattel mortgage to The Riordan Mercantile Company, and was changed to and merged in the note of January 4, 1893, to The Arizona Lumber and Timber Company. (Record, page 57.) By a statement rendered to Fulton by the appellant companies, there was no distinction made between them, while The Riordan Mercantile Company gave the receipt to Fulton for the \$3,000, proceeds of the wool released by appellee bank. (Record, page 60.)

A portion of the note and mortgage of August 30, 1893, was given for future advances, presumably to be made by the payee of the note, The Arizona Lumber and Timber Company, and on the following day there was \$1,000 voluntarily endorsed on that note (record, page 61), and thereafter, it is claimed, advances were made to Fulton by The Riordan Mercantile Company. The amount of the judgment of The Riordan Mercantile Company was \$810.91, nearly \$200 less than Fulton was entitled to by advancements to be made from The Arizona Lumber and Timber Company, had this voluntary endorsement not been made.

Sisson having agreed on January 3, 1893, with appellee bank, that his companies were to continue to carry Fulton along, and make him sufficient advances to enable him to carry on business, in consideration whereof appellee bank released the wool then unshorn,

and of the net value of \$3,000, and having foreborne foreclosure, makes the position of this appellant no better than that of The Arizona Lumber and Timber Company.

Under such circumstances, to allow Sisson, who had acted for and on behalf of one company, to turn about and make advances for and on behalf of another company of which he had the management, so as to defeat the agreement he had made for and on behalf of the other, would be a transaction which would not be upheld by a court of equity.

THE DECREE.

While this court has repeatedly decided, commencing with *Stringfellow vs. Cain*, 99 U. S., 619, down to decisions of the present term, that in an appeal from the Supreme Court of a territory to this court, the jurisdiction of this court on such an appeal, apart from exceptions duly taken on admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment; yet this court has recently said that if a "matter is left in some uncertainty as to the exact facts * * * we will not in such case indulge in any presumption unfavorable to the judgment and for the purpose of reversing it, unless they are natural and probable and such as ought to be drawn from the facts actually found by the court below."

Bear Lake & River W. & L. Co. vs. Garland,
No. 48, Oct. Term, 1896; decided Oct. 19,
1896.

This last rule has special application under the circumstances in this case.

While in this case the facts found by the Supreme Court do not as clearly present the case as could have been made from the undisputed facts in the case, yet it is not our fault. From the record it will appear that the findings of fact were filed on the 13th day of June, 1896 (record, page 107), and bond on appeal filed and ap-

proved on the 22d day of the same month. (Record, page 115.)

The findings purport to have been made in open court, the 4th day of May, 1896 (record, page 107), but where they were during the time elapsing between that day and the day of filing, the record does not disclose.

It further appears that attorneys for all the parties, except appellee bank, stipulated as to the facts. (Record, page 107.)

Under the established practice relating to bills of exceptions and other matters of this nature, opposing counsel are consulted, and given an opportunity to be heard; but in the present case it will be seen that there were only nine days elapsing between the time of filing the findings and taking the appeal, when the Supreme Court of the territory lost all jurisdiction of the case, and could not then alter the findings, and it is evident that the findings were not accessible to appellee bank during the time elapsing between May 4, the date when they purport to have been made, and June 13, the date they were filed.

While we claim that the ultimate facts found support the decree, yet the undisputed incidental facts should be referred to, to a clear understanding of the matters in controversy.

The only contention made as to the *insufficiency* of the findings to support the decree, is that it does not appear that there were increase of the original bearing ewes. As before stated, such fact sufficiently appears.

The fact actually found, that The Northwestern National Bank was an innocent purchaser of the \$6,000 note, is urged as the ground of reversal on its behalf. We have discussed its position in relation to its having notice by reason of the recital in the mortgage of January 4, 1893. Its position, throughout this case, has been to aid the other appellants herein, rather than to collect its demands, which fact alone should place it on the same footing with the other appellants. If, as a matter of fact, the contention of the appellants that the mortgage of January 4, 1893, was killed, when Sisson stated

to The Northwestern National Bank that the mortgage of August 30 was the first mortgage, then, when it appeared undisputed, as it did at the trial, that \$1,250, proceeds of the wool from the sheep covered by the mortgage of August 30, had been applied on the mortgage to The Arizona Lumber and Timber Company after it had ceased to exist, appellant, Northwestern National Bank, should have then insisted and should now insist upon its application to reduce its demand.

It appears, undisputed, that "there has been credited on this note about \$1,250.00 for wool taken from the sheep since they were sold." (Testimony of Sisson, record, page 75. Endorsement on note, record, page 71.)

This fact appeared at the trial, and the \$1,250 should not be applied to a dead mortgage; but if the contention of The Northwestern National Bank be true, it should have been applied in reduction of its claim, for its mortgage covered all the wool on the date of the sale, March 31, 1894 (record, page 106), and it was due November 30, 1893. (Record, page 105.)

Moreover, it appears that The Northwestern National Bank duly protested its note, for non-payment, and was entitled to judgment against The Arizona Lumber and Timber Company for the amount of its demand (record, page 78), and was offered judgment against The Arizona Lumber and Timber Company for the amount of its demand (record, page 42), and did not take it.

Objection is made in the brief of appellants that money is divided instead of sheep, but no such point is raised in the errors assigned.

The same objection has been decided against the contention of appellants in:

Oxsheer vs. Watt, *supra*.

Interstate Galloway Cattle Co. vs. McLain,
supra.

There can be no controversy about the one thousand of the original bearing ewes in existence on the day of the decree as to appellee bank, but as we have before contended that independent of substitution this bank's

mortgage extends to and covers the increase as a matter of law.

The only rights appellant, Northwestern National Bank, can possibly have superior to the appellant companies arises from lack of actual notice of the rights of appellee bank, and if it was put upon inquiry then it has no better rights.

We submit that the decree should be affirmed as to appellee bank.

Respectfully,

CASS E. HERRINGTON,

FRED HERRINGTON,

Solicitors for Appellees, B. N. Freeman et al.,

Copartners as Arizona Central Bank.

